STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	AMENDED*
ECHOSTAR DBS CORPORATION (N/K/A DISH DBS CORPORATION)	:	DETERMINATION DTA NO. 824241
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Years 2004 and 2005.	:	

Petitioner, EchoStar DBS Corporation n/k/a DISH DBS Corporation, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 2004 and 2005.

On July 18, 2012 and August 1, 2012, respectively, petitioner, appearing by Ryan, LLC (Brian L. Browdy, Esq., of counsel) and the Division of Taxation, appearing by Amanda Hiller, Esq. (Clifford Peterson, Esq., of counsel), waived a hearing and submitted this matter for determination based on documents and briefs to be submitted by February 4, 2013, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). After due consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner was properly subject to the Metropolitan Commuter Transportation District tax surcharge imposed pursuant to section 209-B of the Tax Law.

*This determination has been amended to reflect the correct spelling of the Division of Taxation's counsel's name.

FINDINGS OF FACT [1]

1. Petitioner, EchoStar DBS Corporation (now known as DISH DBS Corporation), was incorporated on January 6, 1996 as a Colorado corporation. During the years 2004 and 2005 (years in issue), petitioner was engaged in the business of providing direct-to-home satellite broadcasting services to customers throughout the United States.

2. During the years in issue, petitioner's New York customers were located both within and without the Metropolitan Commuter Transportation District (MCTD).

3. Petitioner timely filed a General Business Corporation Franchise Tax Return (Form CT-3) for each of the years in issue, and timely paid all of the franchise tax it reported as due on those returns.

4. Petitioner timely filed a General Business Corporation MTA Surcharge Return (form CT-3M/4M) for each of the years in issue, and timely paid the temporary metropolitan commuter transportation district surcharge (MCTD Surcharge), in the respective amounts of $10,105.00 and $109,584.00, reported as due on those returns.

5. The Division of Taxation (Division) conducted a field audit of the foregoing returns and determined, as a result thereof, that petitioner owed additional tax in the amount of $60,581.00 for 2004, and was entitled to a refund in the amount of $7,248.00 for 2005, plus interest in each case. The foregoing amounts concern only taxes and interest involving the MCTD Surcharge.

6. On December 14, 2009, the Division issued to petitioner a Notice of Deficiency (L-033115028-3), reflecting the results of its audit and asserting additional tax due for the year 2004 in the amount of $60,581.00, plus interest.

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[1] The facts in this matter are not disputed and are taken from the parties' joint stipulation of facts and annexed documents, excepting therefrom certain facts describing undisputed procedural matters not relevant to resolution of the substantive issue presented.

7. Petitioner challenged the foregoing notice, requesting that the same be cancelled and further requested a refund of the amounts of MCTD Surcharge it had previously paid for the years in issue, plus interest.

8. The parties have agreed that if petitioner is not subject to the MCTD Surcharge for the years in issue, petitioner is entitled to a refund in the amount of $112,441.00.

CONCLUSIONS OF LAW

A. New York State imposes an annual franchise tax on corporations for the privilege of exercising a corporate franchise, doing business, employing capital, owning or leasing property or maintaining an office in the state (Tax Law, art 9-A, § 209[1]). In addition, New York State imposes a business tax surcharge on corporations that are subject to tax under Article 9-A and are doing business, employing capital, or owning or leasing property within the MCTD (Tax Law § 209-B). It is undisputed that during the years in issue, petitioner was subject to the franchise tax imposed per section 209(1). Further, it is undisputed that during the years in issue, petitioner did business within the MCTD and thus was, under the terms of the statute, subject to the surcharge imposed under section 209-B. Petitioner, however, maintains that it is not subject to the surcharge, arguing that section 602(a) of the Federal Telecommunications Act of 1996 impliedly preempts the imposition of the tax surcharge upon petitioner and, further, that imposition of the tax violates petitioner's constitutional right to equal protection of the laws.

B. The MCTD, as established under Public Authorities Law § 1262, encompasses the territory covering the City of New York plus Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester counties. In creating the MCTD the Legislature recognized that the economy of the state was impacted by the transportation services the state provided to commuters traveling within the MCTD, and that there was the need to provide for the "[e]fficient and adequate transportation of commuters within the New York metropolitan area [because] of [its] vital importance to the

commerce, defense and general welfare of the people of the New York metropolitan area, the state, and the nation" (L 1965, ch 324, §§ 1, 8). Under Public Authorities Law §§ 1264 and 1265, the MCTD is managed by the Metropolitan Transportation Authority (MTA). The revenues collected from the imposition of the MCTD Surcharge are, after the deduction of administrative costs incurred by the Division, periodically deposited to the credit of the Metropolitan Mass Transportation Operating Assistance Account of the Mass Transportation Operating Assistance Fund as an appropriation to the MTA via the Metropolitan Transportation Authority Dedicated Tax Fund (Tax Law § 171-a[2]; State Finance Law § 88-a; Public Authorities Law § 1270-c).[2]

C. Petitioner notes that federal law is the supreme law of the land under the Supremacy Clause of the United States Constitution (US Const, art VI, cl 2) and, in turn, pins its preemption argument to the following language of the federal Telecommunications Act of 1996:

> Preemption. A provider of direct-to-home satellite service shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service (Pub L 104-104, Title VI, § 602[a]).

D. Under the Telecommunications Act, Congress defined a "tax or fee" as a "business license tax . . . privilege tax . . . franchise fees . . . or any other tax, license, or fee that is imposed for the privilege of doing business, regulating, or raising revenue for a local taxing jurisdiction" (***id.***, § 602[b][[5]). Further, the term "[l]ocal taxing jurisdiction" was defined to mean "any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee, *but does not include a State*" (***id***. § 602[b][3] [emphasis added]). Finally, section 602(c)

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[2] The Surcharge under Tax Law § 209-B is a percentage of the tax due under Tax Law § 209. It is calculated upon an MCTD allocation percentage that essentially mirrors the three factor (i.e., property, receipts and payroll) business allocation percentage (BAP) of Article 9-A. That is, the MCTD allocation percentage consists of the arithmetic average of the three separate percentages resulting from the ratio of the taxpayer's (1) property, (2) receipts, and (3) payroll within the MCTD to the taxpayer's (1) property, (2) receipts, and (3) payroll within New York State.

provides that the Telecommunications Act "[s]hall not be construed to . . . prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed and collected by a State."

E. Petitioner seeks to invalidate the surcharge in question via implied preemption (***see Fidelity Fed. Sav. & Loan Assoc. v. de la Cuesta***, 458 US 141, 153 [1982]), upon the argument that Tax Law § 209-B conflicts with the "full purposes and objectives of Congress" as expressed in the record surrounding the enactment of the preemption provision set forth in section 602(a) of the Telecommunications Act of 1996 (***see Crosby v. Natl Foreign Trade Council***, 530 US 363, 372-73 [2000]; ***see also Cipollone v. Liggett Group, Inc.***, 505 US 504 [1992]). Specifically, petitioner argues that section 602(a) seeks to shield direct-to-home satellite providers from the costs and compliance burdens presented by being subjected to local taxation in the myriad jurisdictions where their services, though largely not dependent upon local rights-of-way or physical facilities or services, are sold. In fact, there appears to be no dispute that the preemption language of section 602(a) was intended to relieve national service providers such as petitioner from the burdens that could result from permitting "thousands of local taxing jurisdictions to tax such a national service . . ." (142 Cong Rec H1145-06, H1158 [1996]; ***see DirecTV, Inc. v. Treesh***, 290 SW3d 638 [Ky 2009], ***cert denied*** 558 US 1111 [2010]). Petitioner, in turn, maintains that the compliance burdens imposed by Tax Law § 209-B are sufficiently akin to the local tax burdens of concern to Congress and directly preempted via section 602(a) to require preemption of section 209-B by implication.

F. Petitioner's argument in favor of preemption is rejected. While the clear language of the Telecommunications Act relieves direct-to-home satellite service providers from collecting or remitting taxes or fees imposed by local taxing jurisdictions, it also explicitly provides that such preemption does not extend or apply to taxes or fees imposed, as here, by a state. In fact, the Act goes so far as to specifically permit local taxing jurisdictions to receive revenue derived from taxes or fees imposed and collected by a state and in turn distributed to such localities (Pub L No 104-104,

§ 602[c]). To reach the result sought by petitioner requires ignoring, and thus negating, the plain language in the Telecommunications Act limiting preemption to taxes and fees imposed by local jurisdictions while specifically allowing state enacted tax levies. Further, the preemptive relief afforded by section 602(a) is not aimed at saving a taxpayer from the complexity of a given methodology necessary to calculate a particular tax, but rather at minimizing the cost and compliance burdens resulting from having a multiplicity of jurisdictions with a wide variety of impositions (types of taxes, calculation methods and rates) imposed upon national direct-to-home satellite providers, such as petitioner, who do not significantly utilize or rely upon local infrastructure. Those concerns, centering on minimizing undue administrative and compliance burdens resulting from locality-to-locality tax or fee impositions, are simply not present here. In fact, the steps to compute the allocation percentage upon which the section 209-B surcharge is measured are essentially identical to those required to compute an Article 9-A taxpayer's three-factor business allocation percentage (BAP), i.e., determining the relative values of a taxpayer's property, receipts and payroll in a given area versus such values elsewhere. This methodology merely requires a taxpayer to cull data from records it undoubtedly is required to maintain in the regular course of its business (e.g., payroll records of its employees, records concerning property it owns or leases, records of its receipts from customers, and the like) and calculate the necessary percentages from such records.

G. The surcharge under Tax Law § 209-B is imposed and collected by the state and, in turn, is allocated and disbursed to the member jurisdictions comprising the MCTD, a process specifically allowed under the Telecommunications Act of 1996. The individual MCTD member jurisdictions do not decide whether or not to impose the surcharge and do not set the rate of the tax on a

jurisdiction-by-jurisdiction basis (***see DirecTV, Inc. v Treesh***).[3] The section 209-B surcharge is thus simply not a local levy but is, by its explicit terms, a state levy. Petitioner is not required to prepare multiple returns or report and pay a variety of taxes imposed by multiple local jurisdictions. The surcharge thus does not fall within the specific terms of the preemption provision of the Telecommunications Act and, in light of that provision and the legislative history surrounding the same, the surcharge is simply not subject to preemption either directly or by implication (***id.***).

H. Petitioner also argues that Tax Law § 209-B violates the equal protection clause of the United States Constitution because it treats similarly situated taxpayers differently on the basis of where they do business within the state (i.e., a taxpayer situated within the MCTD is subjected to the surcharge whereas a taxpayer situated without the MCTD is not). To the extent this argument is viewed as a constitutional challenge to the facial validity of section 209-B, the same is beyond the jurisdiction of the Division of Tax Appeals (***Matter of Finch Pruyn & Co.***, Tax Appeals Tribunal, April 22, 2004).

I. To the extent petitioner's constitutional argument might be viewed as an "as applied" challenge, petitioner's equal protection claim involves neither a suspect class nor a fundamental right, and thus review is limited to whether the provision in question is rationally related to a legitimate governmental objective (***Heller v. Doe***, 509 US 312 [1993]). In tax matters, courts are especially deferential to a state's legislature (***Port Jefferson Health Care Facility v. Wing***, 94 NY2d 284 [1999], ***cert denied*** 530 US 1276 [2000]), and "the creation of different classes for purposes of

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[3] ***DirecTV, Inc. v. Treesh*** involved a preemption challenge to a State of Kentucky authorization allowing local school district boards of education to levy a utility gross receipts license tax on the gross receipts derived from furnishing utility services, including direct-to-home satellite service, within the various school districts. Each individual school district was authorized to decide the rate of tax to be imposed (not to exceed 3% of gross receipts) and could opt not to impose the tax at all. Some 140 of Kentucky's 170 local school districts imposed the tax, with rates varying on a district-by-district basis. The utility providers were thus required to determine their tax liability on a district-by-district basis and remit the total to the State Department of Revenue every month. The Court found that while the Department of Revenue, an agent of the State, collected the taxes for the various school districts, it was undisputed that the taxes (and the rates of taxation) were actually imposed on a district-by-district basis and not on a statewide basis. Accordingly, the Court held the tax to be preempted, stating that such locally imposed taxes carried the precise locality-by-locality administrative burdens that Telecommunications Act § 602(a) was intended to avoid.

taxation is permissible as long as the classification is reasonable and the taxes imposed are uniform within the class" (***Foss v. City of Rochester***, 65 NY2d 247 [1985]). Here, the Legislature clearly stated a rational basis for creating the MCTD, i.e., to provide for the "[e]fficient and adequate transportation of commuters within the New York metropolitan area [because] of [its] vital importance to the commerce, defense and general welfare of the people of the New York metropolitan area, the state, and the nation" (L 1965, ch 324, § 1), and a legitimate objective in enacting the surcharge under Tax Law § 209-B, i.e., to raise monies for the "support of mass transportation activities in the metropolitan area." (L 1982, ch 91). Thus, the surcharge imposed upon those, like petitioner, who exercise a corporate franchise, do business, employ capital, own or lease property or maintain an office in the MCTD is rationally related to the legitimate objective of providing efficient and adequate transportation to commuters within the MCTD. This rationality of purpose, objective and classification remains true notwithstanding that such taxpayers may exercise their corporate franchise, do business, employ capital, own or lease property or maintain an office both within and without the MCTD, or entirely within or entirely outside of the MCTD. Accordingly, the surcharge as applied to petitioner does not violate petitioner's right to equal protection of the laws.

J. The petition of EchoStar DBS Corporation n/k/a DISH DBS Corporation is hereby denied as is petitioner's claim for refund, and the Notice of Deficiency dated December 14, 2009, is sustained.

DATED: Albany, New York
July 25, 2013

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE